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JOHN F. DAVIS, CLERK

No. 107

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

ARNOLD HABIG AND JEROME SCHROERING

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (R. 11–14) is reported at 270 F. Supp. 929.

JURISDICTION

The order of the district court dismissing Counts 4 and 6 of the indictment was entered on January 23, 1967 (R. 14). Notices of appeal to this Court were filed in the district court on February 20 and 21, 1967 (R. 15–18), and this Court noted probable jurisdiction on October 9, 1967 (R. 19). The jurisdiction of this Court rests on 18 U.S.C. 3731. *United States* v. *Barber*, 219 U.S. 72; *United States* v. *Goldman*, 277 U.S. 229, 236–237.

QUESTION PRESENTED

Under the Internal Revenue Code certain corporate income tax returns were due for filing on May 15, 1960, but the corporations obtained extensions of time to August 15, 1960. The returns were filed on August 12 and 15, 1960. The question presented is whether the six-year statute of limitations on crimes relating to the alleged falseness of the returns began to run when the returns were filed (August 12 and 15, 1960) or when the returns would have been due had there been no extensions of time (May 15, 1960).

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SECTION 6513. TIME RETURN DEEMED FILED AND TAX CONSIDERED PAID.
>
> (a) *Early Return or Advance Payment of Tax.*—For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments.
>
> * * * * *

SECTION 6531. PERIODS OF LIMITATION ON CRIMINAL PROSECUTIONS.

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

* * * * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim or document * * *.

* * * For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable.

STATEMENT

Appellee Habig was the president of Gordonsville Manufacturing Company and W. W. Kimball Company (R. 7–8). Both corporations' income tax returns for the fiscal year ending February 29, 1960, were due on May 15, 1960. 26 U.S.C. 6072(b). Both obtained from the government three month extensions of time for filing the returns—to August 15, 1960. Kimball's

return was filed on August 12, 1960, and Gordonsville's on August 15, 1960. (R. 12.)

On August 12, 1966, a seven count indictment was filed, charging appellees with crimes with respect to these and other tax returns. Count IV (R. 7) alleged that they had attempted to defeat tax owed by Gordonsville by understating its income on the return, in violation of Section 7201 of the Internal Revenue Code of 1954. Count VI (R. 8) alleged that they knowingly aided the preparation and filing of a false and fraudulent return for Kimball by overstating the corporation's gross receipts, in violation of Section 7206(2) of the Code.[1]

Appellees moved to dismiss counts IV and VI (R. 10), asserting that the six-year limitations period, 26 U.S.C. 6531, began to run on the day the returns were first due, May 15, 1960. The government contended that the offenses were committed when the returns were filed, on August 12 and 15, 1960, and that the limitations period did not begin to run until then. The district court accepted appellees' contentions and dismissed both counts (R. 11–14).

SUMMARY OF ARGUMENT

Appellees were charged with crimes that were not committed until the Gordonsville and Kimball returns were filed. Section 6531 of the 1954 Code states that criminal proceedings in such a case must be instituted within six years "next after the commission of the offense." However, it further provides that "[f]or the

[1] The other five counts related to other corporations or a later period (R. 5–9).

purpose of determining the periods of limitations on criminal prosecutions, the rules of section 6513 shall be applicable." The issue here is the proper scope of the last sentence of Section 6513(a).

Section 6513(a), which is captioned "Early Return or Advance Payment of Tax", by its plain language applies only where a taxpayer files his return or pays his tax before the due date specified in the Code. The first two sentences of the subsection provide that any return filed or tax paid "before the last day prescribed for the filing thereof shall be considered as filed [or paid] on such last day"; the third and final sentence states, "For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer." The only function of the latter sentence is to define the phrase "the last day prescribed" used in each of the preceding two sentences. The relevant House and Senate reports in unmistakable terms show this to be the intent of Congress.

The error in the reasoning of the court below, and like decisions of other courts, arose from the isolation of a portion of the third sentence of Section 6513(a) from the rest of the subsection. Contrary to the conclusion of those courts, neither that sentence nor any other part of Section 6513(a) has application to returns, such as those in the case at bar, which are filed after the due date specified in the Code. Thus there is no basis for the anomalous result below that the statute of limitations begins to run before any offense has been committed.

ARGUMENT

THE STATUTE OF LIMITATIONS ON PROSECUTIONS FOR OFFENSES INVOLVING THE FILING, AFTER THE STATUTORY DUE DATE, OF FALSE TAX RETURNS RUNS FROM THE DATE ON WHICH THE RETURNS ACTUALLY WERE FILED

The crimes charged in counts IV and VI of the indictment are based on the contents of the Gordonsville and Kimball returns. Those returns were filed in August 1960. Before the returns were filed, appellees could not have been charged with those crimes, for it is settled that the offenses of attempting to evade by filing a false return, and of aiding in the preparation of a false return, are committed at the time the return is filed. *E.g., Swallow* v. *United States,* 307 F. 2d 81, 83 (C.A. 10), certiorari denied, 371 U.S. 950; *Benham* v. *United States,* 215 F. 2d 472, 473 (C.A. 5); *Butzman* v. *United States,* 205 F. 2d 343, 350–351 (C.A. 6), certiorari denied, 346 U.S. 828; *United States* v. *Yeoman-Henderson, Inc.,* 193 F. 2d 867, 869 (C.A. 7); *United States* v. *Croessant,* 178 F. 2d 96, 98 (C.A. 3); *Cave* v. *United States,* 159 F. 2d 464, 467 (C.A. 8), certiorari denied, 331 U.S. 847.

The limitations period for prosecution of these two offenses is contained in Sections 6531 (2) and (3) of the Code. That period is 6 years, "next after the commission of the offense". The only exception pertinent here is the final sentence of Section 6531, which states, "For the purpose of determining the periods of limitation on criminal prosecutions, the rules of Section 6513 shall be applied". The court below decided that the last sentence of Section 6513(a) sets

forth a rule which justified its conclusion that the limitations period began to run before the commission of the crimes at issue.

1. Section 6513(a) is captioned "Early Return or Advance Payment of Tax." The full text is:

> For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments.

As its title indicates, section 6513(a) was designed to apply when a return is filed or a tax paid before the statutory deadline. The first two sentences deal with the limitations periods on claims for refunds and tax court suits. See 26 U.S.C. 6511, 6512. The two sentences apply only when a return is filed or a tax is paid "before the last day prescribed". In each instance, the date of filing or payment is to be "considered * * * such last day." The third sentence defines the phrase "the last day prescribed" found in the first two sentences. The net effect of the plain language of the statute is to prolong the limitations period whenever a return is filed or tax paid "before the last day prescribed".

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The Section encourages the early filing of returns and early payment of tax, for its effect is to permit a claim for refund to be filed within three years of the last day prescribed by the Code for filing the return, rather than three years from some earlier date on which the return may actually have been filed. For example, if a return is due on April 15 and is filed on January 31, the three-year period during which a claim for refund may be filed begins to run, not on January 31, but on the statutory due date, April 15, when the return is deemed to have been filed.

At the same time the government receives the benefit of a uniform expiration date of the limitations period for the great mass of taxpayers who file or pay on varying dates before the statutory deadline. Consequently, no taxpayer is able to advance the running of the limitations period, for civil or criminal purposes, by filing or paying in advance of that deadline. If, for example, the two corporate returns here in question had been filed April 15, 1960, Section 6513(a) would have caused the six-year statute of limitations to begin running not on April 15, 1960, but on May 15, 1960, the statutory due date.

The substance of the ruling below is that Section 6513(a) shortens the limitations period in the case of returns filed after the statutory due date. This reading of the statute is based on a misapprehension of the meaning of the third and final sentence of Section 6513(a). The pertinent language is "For purposes of this subsection, the last day prescribed for filing the return * * * shall be determined without regard to any extension of time * * *." The critical point is

the proper ambit of the prefatory phrase, "For purposes of this subsection". The "subsection" referred to is plainly Section 6513(a); the application of the third sentence is therefore to the other two sentences of that "subsection." Those two sentences state the "rules of section 6513[(a)]" that are adopted for criminal prosecutions in the final words of Section 6531. The only effect of the last sentence of Section 6513(a), in civil or criminal cases, is to modify the first two sentences of the same subsection, Section 6513(a). It does not, as the court below thought, by itself state an independent and general rule "for the purpose of criminal prosecutions" (R. 13).

The purpose of the third sentence, moreover, is clear. The first two sentences relate respectively to returns filed and payments made "before the last day prescribed" therefor. Income tax deadlines may be "prescribed" in either of two ways. The primary deadline is established by statute—for example, the April 15 deadline for filing tax returns of individuals reporting on a calendar year basis. The second kind of deadline is the type that was "prescribed" for appellees' corporations: an extended date, later than the statutory one, granted by the Commissioner. See 26 U.S.C. 6081, 6161.

The first two sentences of Section 6513(a), unless modified, would apply whether the statute or the Commissioner had "prescribed" the taxpayer's deadline. The effect of the third sentence is to restrict the application of those first two sentences to returns filed and payments made before a deadline created by

statute, and to avoid the application of those sentences to filings or payments made during an extension the Commissioner has granted. The third sentence, like the other two, does not apply to a return filed after the statutory deadline but during an administratively granted extension. Nothing in the language of the section supports the interpretation of the court below that Section 6513(a), which was intended to lengthen the limitations period when a return or payment is early, also shortens the period when filing or payment is later than the statutory deadline.

2. The legislative history of Section 6513(a) confirms that this is the sole effect of its last sentence. The first predecessor of Section 6513(a) was enacted in 1942. See Section 322(b)(4) of the 1939 Code, added by Act of October 21, 1942, Ch. 319, § 169(a)(4), 56 Stat. 877. The report of the House Ways and Means Committee (H. Rep. No. 2333, 77th Cong., 2d Sess. p. 119) states:

> If the taxpayer files his return before the last day on which it is due, the period in which he can file a claim for refund under the provisions of section 322(b)(1), measured from the date the return was filed, will expire sooner than would be the case if he waited until such last day. Section 150 of the bill adds paragraph (4) to section 322(b) to provide that the period of limitations with respect to credit or refund is measured from the last day prescribed for the filing of the return in cases where the return is filed before such last day. *This provision does not apply to taxpayers who are given the benefit of an extension of time in which to file their returns, and file the return before the last day of the extended period.* * * * [Emphasis supplied.]

Accord, S. Rep. No. 1630, 77th Cong., 2d Sess., p. 156.

Section 322(b)(4) of 1939 Code applied only to civil income tax refund proceedings. It was made applicable to criminal matters when the 1954 Code was adopted. At that time, Congress, by adding to Section 6531 the "rules of section 6513," said that it was applying to criminal prosecution "the existing income tax rule *as to early returns* * * *." H. Rep. No. 1337, 83d Cong., 2d Sess., p. A 416; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 587. (Emphasis supplied.)

This legislative history of Section 6513(a), as clearly as the statutory language, demonstrates that the Section was meant to apply only to an "Early Return", *i.e.*, one which was "filed before the last day prescribed for the filing thereof * * * determined without regard to any extension of time granted the taxpayer" (Section 6513(a)), and that it was not meant to apply where—as here—the taxpayer obtained "an extension of time in which to file [his] return." H. Rep. No. 2333, *supra;* Sen. Rep. No. 1630, *supra.*

Therefore, none of the rules of Section 6513(a) applies in the case at bar. It necessarily follows that, as Section 6531 says, the limitations periods began to run on the same dates the returns were filed—the dates of "the commission of the offense[s] * * *." (Section 6531.)

3. The district court's contrary conclusion was based on the Fifth Circuit's decision in *Hull* v. *United States,* 356 F. 2d 919. That case presented a limitations question identical to the present one. Referring

to only the last sentence of Section 6513(a), the court of appeals said (p. 920):

> The statute seems to be clear to the effect that returns are deemed to have been filed and wilful acts of omissions committed on the last date prescribed for the filing of returns irrespective of extensions of time granted; thus, undisputably the statute of limitations bars prosecution on Count One. *United States* v. *Doelker,* 211 F. Supp. 663 (N.D. Ohio, 1962), aff'd per curiam 327 F. 2d 343 (6th Cir., 1964); *United States* v. *Black,* 216 F. Supp. 645 (W.D. Mo., 1963); Mertens, Law of Federal Income Taxation § 55A.15.

Thus, the Fifth Circuit offered no analysis of Section 6513(a), but merely relied on two district court decisions and Mertens. One of the cases on which Hull relies, *United States* v. *Black,* is inapposite. It involved at 1956 return filed in February 1957, before the April 15, 1957 deadline. The district court correctly rejected the defendant's argument that a March 1963, indictment was untimely. Since an early return was at issue, Section 6513(a) plainly had tolled the running of the statute until the statutory deadline, April 15. See also *United States* v. *Scheetz,* 224 F. Supp. 789, 793 (S.D. Ind.).

United States v. *Doelker,* the other case cited in *Hull,* and *United States* v. *Alper,* 200 F. Supp. 155 (D. N.J.), are the only other cases we have found that in any way support the decision below.[2]

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[2] The passage quoted from *Hull* is taken almost verbatim from the portion of Mertens' treatise that the Fifth Circuit cites. Mertens, in turn, relies entirely on *Black*, *Doelker*, and *Alper.*

Both *Doelker*[3] and *Alper* involved charges of failure to file returns in circumstances where an extension of time had been granted. Each holds that the statute of limitations began to run on the date when the return was originally due rather than on the new due date established by a duly granted extension. In each of the two cases the error in the court's reasoning arose from reading the third sentence of Section 6513(a) in isolation from the rest of the subsection. *Doelker* also says (211 F. Supp. at 665):

> To require the Government and the taxpayer to hold the evidence relating to the making of the return for six years from the date prescribed by law on which the return is to be made is long enough. * * *

The court thereby substituted for the statutory language its own views of what the limitations period should be. Section 6513(a) was adopted because Congress decided that in the case of early returns six years is not "long enough". See *United States* v. *Black, supra; United States* v. *Sheetz, supra.* The anomalous effect of *Hull, Doelker, Alper,* and the decision below is to transpose the statute into one that makes the limitations period less six years after commission of the crime—precisely the opposite of what Congress had in mind.

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[3] The government did not appeal this decision. Doelker was ultimately convicted on another count, and the conviction was sustained on appeal. *United States* v. *Doelker*, 327 F. 2d 343 (C.A. 6). Although *Hull* cites the Sixth Circuit as affirming *Doelker* on the limitations issue, the question was not involved in the *Doelker* appeal.

This result, as we have shown above, cannot be squared with language of the Code or the intent of Congress.[4] Our research discloses no other instance in which courts have ruled that a legislature intended a limitations period to begin to run before a crime has been committed or a liability created. Absent the clearest of language, or an unmistakable expression of legislative intent, no prudent person would expect or rely on such a theory in deciding whether to keep evidence relating to tax or other liabilities. Where, as

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[4] There is but one decision, in addition to that below, which considers the Fifth Circuit decision in *Hull. United States* v. *Hensley*, 257 F. Supp. 987 (D. N. Mex.), like the present case and *Hull*, involved a charge of "filing * * * an allegedly false return after the statutory due date and during a period of extension granted by the Director". *Id.* at 990. The district court concluded, as we contend, that "*Hull* * * * is incorrect," and held that the limitations period began to run when the allegedly false return was filed. *Ibid.* However, the decision was based on a different theory than we advance (*ibid.*):

> The third sentence of Section 6513 only relates to determination of the last date *prescribed* for filing a return or paying a tax and fixes that date for purposes of the statute of limitations. Insofar as the offenses charged * * * are concerned, the last date *prescribed* for filing a return or paying the tax has no bearing and is not an issue. The offense, if proved, would have been committed when the return was actually filed, regardless of the due date. [Emphasis in original.]

In another part of the opinion, however, the *Hensley* court approved the result of *Doelker* (*id.* at 989), but distinguished the case on the ground that it involved the different charge of failure to file. We believe that, in so doing, the court erred, since it thereby said that the limitations period, for prosecutions based on a failure to file, begins to run on the statutory due date and not at the end of a duly granted extension, when the duty to file arose.

here, the language of Section 6513(a) does not purport to apply for any purpose to returns filed during an extended period, and where the pertinent legislative materials show that Congress specifically intended to exclude such returns from the ambit of Section 6513(a), there is no basis for the ruling below that the limitations period began to run before a crime had been committed and when no prosecution could have been brought.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded with directions to reinstate Counts IV and VI of the indictment.

Respectfully submitted.

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NOVEMBER, 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967